IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18,903

FRED MEYER, INC., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR REHEARING EN BANC

GEORGE W. MEAD
1211 Public Service Building
Portland 4, Oregon

EDWARD F. HOWREY
HAROLD F. BAKER
1707 H Street, Northwest
Washington, D. C.

Attorneys for Petitioners

Of Counsel:

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Gilbert H. Jertberg, Ben Cushing Duniway, Circuit Judges, and Roger D. Foley, Jr., District Judge.

The petitioner herein asks for a rehearing en banc, limited to the question whether Meyer knew or had reason to know that the concessions it received were unlawful.

I.

The evidence in this case was limited to transactions between Meyer and five suppliers—Burlington Industries, Inc., Cannon Mills Company, Tri-Valley Packing Association, Idaho Canning Company and Phillip Morris Company. The Court held that Meyer's transactions with Tri-Valley and Idaho Canning were not illegal under section 2(d) of the Clayton Act because there was no showing that Meyer paid the allegedly disfavored customers (wholesalers) competed at the same functional level; that 2(d) did not require the sellers to offer proportionately equal benefits to wholesalers who were not in competition with Meyer. For the

same reason, the transactions between Meyer and Phillip Morris, insofar as they concerned United Grocers, a wholesaler, cannot be considered illegal. (Slip Opinion, p. 11, n. 11).

While the Court's opinion does not discuss this issue in connection with the section 2(a)-2(f) charge, the same reasoning necessarily applies, particularly since there was no showing that the retailers served by the unfavored wholesalers were "indirect" customers of Tri-Valley or Idaho Canning,[1] or that they competed with Meyer in the sale of products purchased from such wholesalers. While 2(a) does not in terms require that the favored and unfavored customers be in competition, it has long been the rule that in order to establish competitive injury there must be competition either between sellers in "first line" cases or between buyers in "secondary line" cases. In a "secondary line" case, such as this, "[s]ome competitive nexus between customers receiving the higher and the lower prices is a basic predicate of any conclusion of adverse effects at the customer level attributable to a seller's price differentials." (Rowe, *Price Discrimination Under the Robinson-Patman Act*, 1962, p. 173) "If particular customer classes do not compete in their resale operations, the supplier's price differentials between them cannot impair competition with the recipient of the lower price." (*Id.* at 176)[2]

The transactions between Meyer and Cannon Mills cannot be considered illegal under either 2(a) or 2(d) because the hearing examiner, in a companion case against Cannon

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[1] The complaint does not charge a 2(a) violation involving Phillip Morris.

[2] See testimony of FTC Chairman in *Dual Distribution in the Automotive Tire Industry*, 1959, Hearings Before a Subcommittee of the Senate Select Committee on Small Business, 86th Cong., 1st Sess., Part I, at 134-35, 143; *Chicago Sugar Company* v. *American Sugar Refining Company*, 176 F. 2d 1 (7th Cir. 1949); *Secatore's, Inc.* v. *Esso Standard Oil Company*, 171 F. Supp. 665 (D. Mass. 1959); *Jarrett* v. *Pittsburgh Plate Glass Company*, 131 F. 2d 674, 676 (5th Cir. 1942); *A. J. Goodman and Son, Inc.* v. *United Lacquer Mfg. Corp.*, 81 F. Supp. 890, 893 (D. Mass. 1949); and *Sano Petroleum Corp.* v. *American Oil Company*, 187 F. Supp. 345 (E.D.N.Y. 1960).

Mills, held that the discount to Meyer—the identical discount challenged here—was fully cost justified (*Cannon Mills Company,* Initial Decision, CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶ 16,682), and the Commission later dismissed the complaint on the ground there was no injury to competition (*Cannon Mills Company*, CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶ 16,878).[1]

In view of the foregoing, the concessions which Meyer received from Tri-Valley, Idaho Canning and Cannon Mills, and a portion of those received from Phillip Morris, cannot form any basis for the Court's decision that Meyer knew or had reason to know that said concessions were unlawful.

If the foregoing analysis is correct, and we believe it is beyond dispute, the Court's finding that Meyer knew or had reason to know that the concessions it induced were unlawful must have been based solely on Meyer's transactions with Burlington Industries in connection with the 2(a) charge, and solely on transactions with Burlington and Phillip Morris in connection with the 2(d) charge. In other words, the evidential score, at the very least, was 85 percent in petitioner's favor on the 2(a) charge and 70 percent in its favor on the 2(d) charge.[2]

Based on such a score card we do not think it right or proper for the Court to infer knowledge of illegality,

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1 The respondent, on page 75 of its brief, after referring to the fact that the Commission had dismissed the complaint against Cannon Mills Company, says:

> Accordingly, while we rely upon Cannon Mills' discriminations as constituting violations of section 2(d), . . . we do not rely upon its price discriminations as constituting violations of section 2(a), or upon their inducement and receipt by petitioners as constituting violations of section 2(f).

However, since the Commission dismissed the complaint on the ground of lack of injury to competition, we think it is equally clear that respondent cannot rely on the Cannon Mills transaction to support its 2(d) charge.

2 On the 2(a) charge only one customer out of seven is left for consideration and under the 2(d) charge only two customers out of seven are left for consideration.

particularly when the remaining evidence was admittedly "weak" and "scanty".

In 1958, during the coupon promotion period, Meyer purchased from Burlington Industries in much greater quantities than the disfavored customer—4308 dozen hose versus 354 dozen, with a price differential of about ten percent (CX 156)—yet this Court held that Meyer had reason to believe that the supplier could have no cost justification defense. This holding, we suggest, is in conflict with the facts, with *Automatic Canteen Co.* v. *FTC,* 346 U.S. 61 (1953), and with this Court's holding in *Alhambra Motor Parts* v. *FTC,* 309 F. 2d 213 (1962). In its Slip Opinion herein, this Court said:

> . . . the evidence which supports the Commission's finding that Meyer had reason to believe that the discriminatory terms and prices it received were not cost-justified is weak but not insufficient. (p. 17)

In view of the *Cannon Mills* decision and the great differences in quantity, this finding should be reconsidered.

With reference to the 2(d) charge involving Phillip Morris, the Court said:

> The evidence before the Commission on this point is indeed scanty. (Slip Opinion, p. 9)

This case, one of the most important that has ever confronted the retail food industry, where the government has the burden of proof, should not, we respectfully submit, be decided on "weak" and "scanty" evidence.

Even if the Court should reject our other contentions, we do not see how it can possibly disregard the *Cannon Mills* case, *supra.* Based on an elaborate cost study, which is discussed at length in his opinion, the hearing examiner found that the cost savings to Cannon arising from Meyer's larger quantities was 12.135¢ per dozen while the discount was only 10¢ per dozen. Certainly, in the light of this affirmative finding of cost justification this Court should not infer that Meyer *knew* or *should have known* that similar transactions with other suppliers, involving similar differences in quantities, could not be cost justified.

II.

The decision of the Court is in conflict with the spirit and, we believe, the letter of *Automatic Canteen, supra.* While the Court "buttressed" its opinion by quoting isolated phrases from *Automatic Canteen,* we are certain that a rereading of the Supreme Court's decision in full text will demonstrate that the decision here is in conflict with the purpose and intent of the Supreme Court's holding, namely, that the statute should not be interpreted as "putting the buyer at his peril whenever he engages in price bargaining," that "[s]uch a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated" (346 U.S. at 73-74).

To paraphrase the Supreme Court in *Automatic Canteen,* if this decision against Meyer stands, it would render the "knowingly" requirement of the statute meaningless (*Id.* at 71), would comprehend any buyer who engages in bargaining with the seller (*Id.* at 72), and would put the Robinson-Patman Act in direct conflict with the broader antitrust policies of the Sherman Act (*Id.* at 74).

Conclusion

For all of the foregoing reasons, petitioner respectfully requests the Court to grant a rehearing. Petitioner also respectfully requests that the rehearing be conducted en banc.

George W. Mead
1211 Public Service Building
Portland 4, Oregon

Edward F. Howrey
Harold F. Baker
1707 H Street, Northwest
Washington, D. C.

Attorneys for Petitioners

Certificate of Counsel

I certify that the foregoing petition for rehearing is presented in good faith and is not interposed for delay and is, in my judgment, well founded.

I further certify that, in connection with the preparation of this petition, I have examined Rule 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with that rule.

EDWARD F. HOWREY
Attorney for Petitioners

Certificate of Service

I certify that on this day of April, 1966, three copies of the foregoing petition for rehearing were served upon the Federal Trade Commission by mailing same, postage prepaid, to Joseph W. Shea, Secretary, Federal Trade Commission, Washington, D. C.

EDWARD F. HOWREY
Attorney for Petitioners